U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 December 2003

CASE NO. 2003-LHC-0005

OWCP NO. 15-45165

In the Matter of:

ERNIE CRUZ, JR.,
Claimant,

vs.

MATSON TERMINALS, INC.,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION,
Carrier.

Appearances:

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For Claimant

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For Employer/Carrier

Before: ANNE BEYTIN TORKINGTON
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

Ernie Cruz, Jr. ("Claimant") brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. § 901 *et seq.* against Matson Terminals, Inc. ("Employer") and its carrier. A formal hearing was held in Honolulu, Hawaii on March 7, 2003, at which all parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits ("ALJX") 1-3,[1] Transcript ("Tr") 9, Claimant's Exhibits ("CX") 1-23, Tr 10, and Employer/Carrier's Exhibits ("RX") A-G, Tr 11. On May 2 and 12, 2003 respectively, Claimant and Employer submitted their post-trial briefs, which were admitted as ALJX 4 and ALJX 5 in that order.

Stipulations:

The parties agreed to the following stipulations:

1. The parties are subject to the Act;

2. The claim was timely noticed and timely filed;

3. Claimant suffered an injury;

4. At the time of the injury an employer/employee relationship existed between Claimant and Employer;

5. Claimant's annual earnings for the year prior to the date of injury were $66,224.90 per CX 6, p.11;

6. Claimant resumed working on January 13, 2003, and he is doing his regular pre-injury work without loss of earnings;

7. Claimant has not reached maximum medical improvement.

I accept all of the foregoing stipulations as they are supported by substantial evidence of record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

Issues in Dispute:

1. Whether the injury arose out of and in the course of employment (causality);

2. Entitlement to temporary total disability benefits from July 8, 2000 through January 12, 2003;[2]

[1] ALJX 1 is Claimant's pre-trial statement; ALJX 2 is Employer's pre-trial statement; and, ALJX 3 is the Order Accepting Withdrawal Without Prejudice of Claimant's claim against McCabe Hamilton & Renny, and its carrier, Eagle Insurance Co.

3. Entitlement to Section 7 benefits;

4. Average weekly wage.

SUMMARY OF DECISION

Claimant's right knee injury did not arise out of or in the course of his employment with Employer. Therefore, he is not entitled to an award of compensation benefits or medical care.

SUMMARY OF EVIDENCE

Claimant's Testimony

Ernie Cruz, Jr. ("Claimant") testified on his own behalf at the hearing on March 7, 2003. Claimant is forty-two years old and currently works as a winch man.[3] He has worked as a longshoreman since February 1, 1989. Claimant injured his right knee while playing basketball in January 1996, when he tore his anterior cruciate ligament ("ACL"). Tr 15, 35; CX 13, p.23. As a result of this injury, Claimant underwent corrective surgery performed by Dr. Darryl Kan in February 1996. Tr 15; CX 13, p.29.

Claimant has experienced ongoing right knee problems since the February 1996 surgery, and claims that he developed work-related cumulative trauma to his right knee between July 8, 1999 and July 7, 2000. Tr 14, 35-36. Claimant testified that he stopped working on July 7, 2000 at the end of his work shift because his right knee was hurting, felt loose and was buckling. Tr 16. Claimant testified that during the year preceding July 2000, he developed progressively worse right knee pain and instability with all activities, including "work, surf [and] home," but that work was most strenuous. Tr 30, 33. Claimant denied that he had ever had a specific injury to his right knee while surfing, though he did have specific injuries to his cheek and rib.[4] Tr 29. Claimant testified that surfing involves squatting, twisting, and puts stress on the knees. Tr 49. According to Claimant's testimony, work activities which produced pain and looseness to his right knee, were walking, climbing and dragging equipment on vessels and climbing access ladders to straddle carriers.[5] Tr 26, 30-32. During that year, Claimant wore a knee brace every day to support his right knee, according to his testimony. Tr 30. Claimant testified that he did

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[2] This is based on a claim of cumulative trauma from July 8, 1999 through July 7, 2000.

[3] The transcript uses the term "wenchman," a term with which I am not familiar, except in the colloquial sense. Therefore, I have substituted the term "winch man." in its place. See Tr 13.

[4] While answering questions on cross-examination related to his reasons for changing physicians from Dr. Kan to Dr. Oishi, Claimant candidly stated that he "always had some kind of pain or discomfort . . . it never got back to 100 percent [after the ACL surgery Dr. Kan performed in 1996] and then I got injured surfing." Tr 59.

[5] Claimant's initial response was "not necessarily" when his attorney asked him if the repeated climbing of access ladders to straddle carriers was physically strenuous. Claimant changed his response to "yes" when prompted by his attorney. Tr 24-25.

not realize that his right knee problem was work-related until Dr. Oishi's November 30, 2001 report.[6] Tr 34.

On July 6, 2000, Claimant sought medical care with Dr. Kan, the doctor who had performed his 1996 knee surgery, because his right knee pain and instability had worsened. Tr 17, 28.

On cross-examination, Claimant testified that he could not remember whether on July 6, 2000 he told Dr. Kan that problems he was having with his right knee were caused by work, Tr 36, specifically climbing strad ladders or dragging equipment, or that he had been wearing a knee brace to work for the past year. Tr 36-38. Nor could Claimant remember whether he told Dr. Kan whether any activity other than surfing had caused his right knee problems. Tr 40-41. Claimant admitted on cross-examination that just prior to July 2000, as he had related to Dr. Kan, he injured his right knee surfing, specifically testifying that he twisted his knee and sprained it. Tr 41-42, 54.

After the July 6, 2000 examination, Dr. Kan referred Claimant to Dr. Singer for evaluation and treatment of a cyst present in his right knee. Tr 44; CX 13, p.44. Claimant testified that he could not remember whether he told Dr. Singer at the July 10, 2000 examination about right knee problems that he alleged had developed over the preceding year and were associated with work or that he had been wearing a knee brace to work during that year. Tr 43-45. After surgery, Dr. Singer referred Claimant back to Dr. Kan for continuing treatment for a possible meniscus tear. Tr 57. Claimant saw Dr. Kan, but decided to get another opinion when his knee pain continued and Dr. Kan suggested he take steroids. Tr 57-59.

Claimant began treatment with Dr. Oishi on May 24, 2001, CX 16, p.61. Claimant testified that he did not know whether he told Dr. Oishi that he had injured his right knee surfing and did not remember whether Dr. Oishi asked about any specific incident where he injured his right knee. Tr 45-46.

Dr. Darryl Kan, M.D.

Dr. Kan did not testify. He specializes in orthopaedic surgery and sports medicine, according to his letterhead. CX 13, p.26. His records of Claimant's treatment are found at CX 13. Dr. Kan first treated Claimant on January 23, 1996, after he injured his knee while playing basketball. At that time he felt Claimant had a complete tear of the ACL and a possible tear of the lateral meniscus. The MRI showed a tear of the medial meniscus as well as a complete rupture of the ACL. In addition there was a cartilaginous defect of the medial femoral condyle. CX 13 at 26. Dr. Kan performed surgery on Claimant's right knee on February 8, 1996. The operation entailed an arthroscopy with partial lateral menisectomy and ACL ligament reconstruction. The pre and post-operative diagnoses were the same: right knee ACL tear and

[6] Dr. Oishi's November 30, 2001 "report" was actually a letter addressed to Mr. Easley, Claimant's attorney, in response to a letter Mr. Easley had written Dr. Oishi asking whether Claimant's right knee problem was work-related. See CX 17. Claimant retained Mr. Easley in April 2001, Tr 57, several months before he "learned" that his knee problem was work-related.

lateral meniscal tear. Dr. Kan also found a "small bucket handle type lateral meniscal tear" and a "grade IV defect in medial femoral condyle." CX 13 at 29.

Claimant returned to work at full duty on January 27, 1997. *Id*. at 39. Dr. Kan saw Claimant again on January 9, 1998 and found that Claimant's right knee was stable, there was no problem with the graft, and that Claimant had a grade IV chondral defect which might cause some recurrent swelling and some catching about the knee. *Id*. at 40. Claimant returned to Dr. Kan on July 6, 2000, the day before he last worked a full day. At that time, an MRI of Claimant's right knee revealed that Claimant was status post ACL reconstruction, no evidence of meniscal tear, and a cystic lesion of three centimeters. *Id*. at 42. On clinical examination, Dr. Kan found no evidence of instability of the knee and did not think the giving way sensation Claimant experienced was due to any meniscal pathology. Dr. Kan noted that Claimant's "complaints started with surfing. He has been surfing since the surgery without any real problem until just recently." *Id*. at 44. No reference is made to any work-related complaints. Dr. Kan referred Claimant to Dr. Daniel Singer for evaluation and treatment of the lesion found on the MRI. *Id*.

After Dr. Singer completed surgery, he referred Claimant back to Dr. Kan who then examined him for the last time on May 16, 2001. On that visit, Claimant complained of right knee pain over the medial joint line with clicking. Dr. Kan related this symptom to the chondral defect in the medial femoral condyle found on Dr. Singer's surgery. *Id*. at 45.

Dr. Daniel Singer, M.D.

Dr. Singer did not testify at the hearing. He is a specialist in orthopaedic hand surgery and orthopaedic oncology, according to his letterhead. His treatment records of Claimant are found at CX 14. In a letter to Dr. Kan dated July 10, 2000, Dr. Singer, commenting on Claimant's chief complaint of pain and instability in his right knee, stated that following the ACL done by Dr. Kan,

> [Claimant] was fine until about three months ago. He noticed a little instability. However, he injured it about a month ago, twisting and felt it was unstable and feels he cannot work on unstable ground.

CX 14, p.46.

Dr. Singer performed surgery on Claimant on August 7, 2000. The pre and post-operative diagnoses are the same: "Lesion of medial femoral condyle, right knee, possibly giant-cell tumor versus aneurysmal bone cyst." Dr. Singer performed an incisional biopsy of the lesion. CX 14, p.52.

In a follow-up note dated August 14, 2000, physical therapist Pat Arilic states that Claimant "wants to use crutches because he has a lot of stairs." *Id*. at 54. Dr. Singer continued to follow Claimant for visits once a month through November, 2000, then saw Claimant again on February 5, 2001. On the visit of May 7, 2001, Dr. Singer commented that x-rays show slight narrowing of the medial joint space and Claimant "may have some intraarticular abnormality

such as a partial medial meniscus tear causing joint pain . . . . suggested he see Dr. Kan about this." *Id*. at 58.

Mr. Easley wrote Dr. Singer on April 30, 2001, stating that he had filed a cumulative trauma claim against McCabe and Matson on Claimant's behalf, enclosed the claim,[7] and asked Dr. Singer's opinion as to whether Claimant's work as a longshoreman from July 9, 1999 to July 7, 2000 had caused, aggravated, or accelerated Claimant's right knee bone cyst or any other right knee medical problem. CX 15, p.60. Dr. Singer replied in a letter dated May 10, 2001, that

> as far as I know, his work as a longshoreman from 7/8/99 to 7/7/00 did not cause, aggravate or accelerate his giant cell tumor of bone of his right knee. If I could be of any further help please let me know.

Id. at 59.

Dr. Calvin Oishi, M.D.

Dr. Oishi did not testify at the hearing. According to the CV submitted by Claimant at CX 18, Dr. Oishi is board-certified in orthopaedic surgery. He is also a Clinical Professor of Surgery at the University of Hawaii Medical School. Records of Dr. Oishi's treatment of Claimant are found at CX 16.[8]

Dr. Oishi first examined Claimant on May 24, 2001. After review of arthroscopic pictures, Dr. Oishi found a grade 4 lesion of the medial femoral condyle and on MRI, he found an intact graft. On examination, Dr. Oishi found some loosening of the graft. Dr. Oishi injected Claimant's right knee with corticosteroids. Dr. Oishi's plan was to consider diagnostic arthroscopy if the injection failed. CX 16, p.61. On June 4, 2001, Dr. Oishi once again examined Claimant, found equivocal relief from the injection, and referred Claimant for a bone scan. *Id*. at 65. After reviewing the bone scan, Dr. Oishi recommended diagnostic arthroscopy and possible revision of the ACL repair. *Id*. at 67. Claimant underwent surgery on June 30, 2001. Dr. Oishi found: (1) Complex tear of the posterior third and anterior third of the medial meniscus; (2) Complex tear of the middle third of the lateral meniscus; (3) Grade III-IV chondromalacia of the medial femoral condyle; (4) Extensive synovitis; (5) Partial ACL deficiency (5-mm anterior drawer); (6) Grade II chondromalacia of the patellofemoral and medial lateral tibiofemoral joints. *Id*. at 69.

On July 23, 2001, upon examination of Claimant and finding a Lachman's at 1-2+,[9] Dr. Oishi was considering an ACL repair if symptoms persisted. *Id*. at 72. After three more visits, two in August and one in September, Dr. Oishi opined on October 5, 2001 that Claimant still had

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[7] CX 15 contains this letter, but not the enclosure, so it is unclear which claim was enclosed, since Claimant filed two, both on April 3, 2001: (1) for a right knee bone cyst, CX 2; (2) for right knee ACL and meniscus, CX 3.

[8] According to Dr. Kan's letterhead, Dr. Oishi practices at the same medical group as Drs. Kan and Singer: Orthopedic Associates of Hawaii, Inc. CX 16, p.26.

[9] Lachman's test: assessment for ACL rupture with a positive test at "42" and a negative test at "0.1." <http://www.fpnotebook.com/ORT79.htm>

a 10% deficit of his hamstrings, which would need reversal before ACL surgery was done. *Id*. at 76. On November 5, 2001, Dr. Oishi stated that when Claimant's Biodex was normal and he still had giving way, ACL surgery would then be considered. *Id*. at 77. On November 12, 2001, Claimant's Biodex had less than 10% deficits and he still had pain and giving way. Dr. Oishi decided to schedule ACL ligament revision, believing that the "chondral defect is getting abraded from looseness of ACL graft." *Id*. at 78. On December 6, 2001, Dr. Oishi examined recent x-rays and found that the giant cell tumor was "stable." Id. at 80. Dr. Oishi performed surgery on December 7, 2001. Dr. Oishi revised Claimant's right ACL graft utilizing a bone-patellar tendon-bone autograft. He also removed the retained DonJoy femoral and tibial screws from the prior ACL operation. His findings were as follows: "1. Anterior cruciate ligament deficiency via loosening of hamstring graft and loose screws. 2. Relatively intact medial and lateral menisci. 3. Grade III-IV chondromalacia of the medial femoral condyle." CX 16, p.81. Dr. Oishi followed Claimant throughout his recovery period during which Claimant was stable and doing well and released Claimant to return to full duty on January 13, 2003. *Id*. at 95.

Mr. Easley wrote Dr. Oishi on October 23, 2001. Mr. Easley stated that he had filed a cumulative trauma claim against Employer on behalf of Claimant and enclosed the claim in the letter.[10] Mr. Easley asked Dr. Oishi the following question: "In your opinion, did Mr. Cruz's work as a lonshoreman from 7-8-99 to 7-7-00 cause, aggravate or accelerate his right knee medical problem?" CX 17, p.98. Dr. Oishi responded to Mr. Easley's letter on November 30, 2001, stating that he believed Claimant had aggravated his ACL reconstruction and medial femoral condylar lesion somehow after the surgery [of 1996] until January 1998 and that this had continued through 2000. Dr. Oishi presumed that the ACL graft had stretched a bit; and commented that Claimant's Lachman's was greater than 5 mm, approximately 6mm. Dr. Oishi opined that this motion [from the stretched ACL] in combination with the medial femoral condylar lesion was causing Claimant discomfort in his knee, which was disabling. Dr. Oishi continued:

> I would suspect that continued climbing, squatting, jumping, which I believe this gentleman has to do at work, certainly could have led to the loosening of the graft with subsequent complaints. I think this would be a gradual process and not an acute event. I believe if it was an acute event, Mr. Cruz would notify us that he had an injury.

Id. at 96-97.

There is no notation in Dr. Oishi's records of Claimant's right knee complaints following surfing, nor any notation that Claimant had ever engaged in surfing.

Dr. Clifford Lau, M.D.

Dr. Lau did not testify at the hearing. Dr. Lau examined Claimant on March 7, 2002, as an independent medical examiner on behalf of Employer. His report is at RX D. He is board-certified in orthopaedic surgery. RX G. Dr. Lau reviewed Claimant's medical records, took a

[10] CX 17 is the exhibit containing Mr. Easley's letter, and does not include the enclosure as part of the exhibit. See, e.g., note 7 above.

history from him, and examined him. In the history, Dr. Lau noted that Claimant had stated that he experienced right knee pain which Dr. Kan treated with anti-inflammatories. He had buckling any time he stepped on uneven ground, and he felt instability in his right knee while climbing ladders and doing normal work activities. Dr. Lau related that Claimant told him Dr. Kan wanted to place him on oral steroids following surgery by Dr. Singer, and that Claimant did not want to take them then changed doctors to Dr. Oishi. RX D, p.4. Dr. Lau's opinion follows:

> [Claimant's] initial MRI scan in January of 1996, showed bone contusions, as well as focal cartilaginous defect in the medial femoral condyle. . . . There were multiple reports of surfing injuries from 1998 though 2000. The nature of surfing could cause more stress to the knee, as well as injuries, with repetitive squatting and twisting, or rotatory type movements to the knee. In Mr. Cruz's case, this was documented in the medical records where he saw Dr. Kan several times for complaints of pain after surfing. In his history today, Mr. Cruz states his pain in his knee started after surfing, but does not remember, but he felt that it was years ago. He states that his knee started feeling loose and he had the buckling type sensation after a surfing incident. . . . . In Dr. Oishi's report of May 24, 2001, he acknowledged the MRI scan demonstrating an intact graft, but his examination showed some loosening of the graft, which was not inconsistent, as his graft is several years old and was a hamstring. I believe Dr. Oishi was referring to the fact that hamstring grafts have been known to stretch a bit over years in the range of 1 to 2 mm. . . . Apparently, the bone-patella-bone grafts tend not to stretch as much as the hamstring grafts. In Dr. Oishi's case, he believes that the graft stretched out greater than 5 mm, and actually was 6 mm on his evaluation. He states this in his letter of October 30, 2001. I note from the KT-2000 reading done on July 15, 1996,[11] that the right knee was rated as 7 mm of displacement. This would indicate that Mr. Cruz had 7 mm of displacement of his anterior cruciate ligament repair in July of 1996. Therefore, Dr. Oishi's findings on his exam under anesthesia and arthroscopy of June 30, 2001, are within 1 mm of the test that was performed back in July of 1996. This would indicate that there is no new loosening that occurred from 1996 to 2001. . . . I believe that his current problems with his right knee are still due to his initial injury of January of 1996, where he suffered a tear to his anterior cruciate ligament and an injury to the medial femoral condyle that resulted in bare bone on the medial femoral condyle, an area of approximately 1 mm in diameter. . . . I believe his symptoms are related to the initial injury of January of 1996, and not to any specific work-related activity or injury. . . . Unfortunately, his defect of the medial femoral condyle is on the weightbearing surface and therefore continued symptomatology is probably to be expected.

RX D, p.10-11.

[11] There is no record of the actual KT-2000 test done on July 15, 1996. The only record referencing that test is Dr. Kan's note in his report of July 16, 1996 wherein he states that Claimant's "KT-2000 test showed .5 mm of difference side to side." CX 13, p.37.

ANALYSIS

Causality

Claimant contends that he suffered a right knee cumulative trauma injury at Employer from July 8, 1999 through July 7, 2000, resulting in temporary total disability from July 8, 2000 through January 12, 2003, with attendant medical treatment. Employer contends that while Claimant did injure his right knee, it was not at work; rather, his impairment to it as of July 8, 2000 was related to injuries he suffered while surfing and to his original basketball injury in 1996.

Section 20(a) *Prima Facie* Case

An injury compensable under the Act must arise out of and in the course of employment. Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc.* v. Director, OWCP, 455 U.S. 608, 615, 102 S.Ct. 1312, 1317 (1982) ("The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer."). However, a claimant is entitled to invoke the presumption if he or she presents at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990).

Claimant is able to establish a *prima facie* case using the Section 20(a) presumption. Claimant testified that various activities on the job, such as walking, climbing strad ladders, and dragging equipment, caused pain and looseness in his right knee. Dr. Oishi, Claimant's current treating physician, stated in a letter to Claimant's attorney that Claimant had aggravated his [1996] ACL repair and medial femoral condylar lesion after the [1996] surgery until approximately January 1998, continuing through 2000 and Dr. Oishi would suspect that continued climbing, squatting, and jumping, which he believed Claimant had to do at work, could have led to the loosening of his graft with subsequent complaints. Evidence presented through Claimant's testimony and his doctor's letter is sufficient to establish a *prima facie* case under the Section 20(a) presumption that Claimant's right knee injury was causally related to his work at Employer. Employer, however, is able to rebut the presumption.

Rebuttal of Section 20(a) Presumption

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). Substantial evidence is the kind of evidence "a reasonable mind might accept as adequate to support a conclusion." *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). For instance, the unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment amounts to substantial evidence and is therefore sufficient to rebut the presumption. *Duhagon v. Metropolitan Stevedoring Co.*, 169 F.3d 615, 618 (9th Cir. 1999) citing *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

Employer is able to rebut the Section 20(a) presumption through the testimony of its expert, Dr. Lau. Dr. Lau stated in his May 7, 2002 report based on his examination of Claimant and review of the medical records, that Claimant's right knee condition is wholly attributable to Claimant's 1996 injury and aggravation caused by Claimant's surfing. In addition, Dr. Singer, Claimant's treating physician, stated unequivocally that Claimant's giant cell tumor in his right knee was not caused, aggravated, or accelerated by his longshore work. Finally, although Dr. Singer viewed Claimant's knee condition in its entirety while performing the August 2000 arthroscopy, he did not indicate that any other right knee condition was work-related. The evidence submitted from Drs. Singer and Lau is sufficient to rebut the Claimant's *prima facie* case. Thus, the Section 20(a) presumption falls out of the case and the evidence must be weighed and the issue resolved based on the entire record. Claimant has the ultimate burden of proof, and is unable to carry it, based on the analysis below.

Claimant's case is based on his testimony and on Dr. Oishi's November 30, 2003 letter. Claimant's testimony is not convincing and Dr. Oishi's opinion is uninformed since he was never apprised of Claimant's surfing activities, nor of their proximity to Claimant's inability to work starting July 8, 2000.

Claimant's testimony is unconvincing. His trial testimony is the first time he related his knee symptoms as to his job activities, other than in his longshore claims, filed in July 2001. The medical records are bereft of complaints of right knee pain related to work activity. The closest Claimant came to relating work to his knee pain was to state that he was uncomfortable working on uneven ground. See Dr. Singer's record at CX 14, p.46 and Dr. Lau's record at RX D, p.4.[12] On the other hand, Claimant reported right knee symptoms in direct relationship to surfing activities per Dr. Kan's records at CX 13, p.44. Finally, Claimant *did not* report anything to Dr. Oishi regarding surfing activities. It is impossible to disregard the timing of the lack of

[12] The history Claimant related to Dr. Lau was taken after Claimant was already engaged in litigation on the causality issue. In that history, Claimant also told Dr. Lau that he felt instability in his right knee while climbing ladders and doing normal work activities. RX D, p.4.

reporting of what appears to be critical history. Dr. Singer, Claimant's treating physician for his right knee surgery in August 2000, wrote to Claimant's attorney on May 10, 2001, stating unequivocally that there was no relationship between Claimant's right knee giant cell tumor and his work, nor did he relate any other knee problem to Claimant's work. Claimant changed from Dr. Kan, who was aware of his surfing history, to Dr. Oishi who was unaware of same, on May 24, 2001, fourteen days after Dr. Singer's letter. In addition, Claimant testified that he was unaware that his knee injury was work-related until Dr. Oishi's November 30, 2001 letter. Yet he hired Mr. Easley to represent him in April 2001, and filed longshore claims relating the right knee problem to cumulative trauma on the job, on April 3 and July 17, 2001. Based on the foregoing, I find thatClaimant's testimony at trial is self-serving, and therefore unconvincing.

Claimant's case is still supported by the opinion of his treating physician, Dr. Oishi. Normally, when considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to special weight. *Amos v. Director,* OWCP, 153 F.3d 1051 (9th Cir. 1998). However, a treating doctor's opinion is not necessarily conclusive regarding a claimant's physical condition or the extent of his disability. *See Magallanes v. Bowen,* 881 F.2d 747, 751 (9th Cir. 1989); *Amos,* 153 F.3d at 1054 (special weight standard limited to treating doctor's opinion regarding treatment). Moreover, the court may reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the decision sets forth specific, legitimate reasons for doing so that are based on substantial evidence in the record. *Magallanes,* 881 F.2d at 751.

While a treating physician's opinion normally deserves deference, Dr. Oishi's does not because it was misinformed. Had Dr. Oishi known about Claimant's surfing activities, his opinion may have been different. Dr. Oishi even stated in his opinion that he thought Claimant's knee condition was due to "a gradual process and not an acute event. I believe *if it was an acute event, Mr. Cruz would notify us that he had an injury*." CX 17, p.97 (emphasis mine). Had Dr. Oishi read Dr. Kan's records, he would have seen that Claimant had reported knee pain related to surfing activities. Had Dr. Oishi been so informed, he may have revised his opinion. Thus, Dr. Oishi's opinion is not reliable.

Employer is able to bolster its case through the medical opinions of Drs. Singer and Lau. Dr. Singer was Claimant's treating physician. He had no reason for bias as he was not hired by Claimant or Employer for the purpose of litigation. Dr. Singer stated unequivocally that Claimant's right knee condition, at least as it related to the giant cell tumor, was not related to Claimant's work. Finally, Dr. Lau, who examined Claimant, reviewed his medical records, and wrote a report at Employer's behest, unequivocally opined that Claimant's right knee condition was related to his 1996 injury which was aggravated by surfing, and not by work.

In summary, the weight of the evidence is on Employer's side and Claimant is unable to carry his burden by the preponderance necessary to prove his case.

I do not reach the remaining issues of temporary total disability, Section 7 benefits, and average weekly wage because Claimant's injury is found to be unrelated to his work activities.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, the following order is issued:

1. Claimant shall take nothing.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge